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CASE # _____

In The Supreme Court Of The United States

TROUTWINE FAMILY TRUST, BY JOHN TROUTWINE AND KERRY TROUTWINE, TRUSTEES,

PETITIONERS

vs.

COUNTY OF NEVADA; SHERIFF WILLIAM HEAFEY; UNDERSHERIFF PAUL RANKIN; STATE OF CALIFORNIA EX REL STATE LANDS COMMISSION
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE
CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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64 pp

THE QUESTIONS PRESENTED FOR REVIEW

1. Where plaintiff's predecessors in interest received a grant for two tracts of land for mining purposes in the late 1800s under then existing definitions of "navigability," which was limited to "capable of carrying commerce," can the State, consistently with the 5th Amendment "taking" clause, in the absence of legislative changes, redefine "navigability" to include recreation, fishing, and other uses, thereby imposing on plaintiff easements which did not exist at the time of the original grants?

2. Is California's cross-claim to quiet title in itself time barred under 28 U.S.C., § 2409a, which provides a 12 year limitations of actions to quiet title on property derived from the United States Government?

LIST OF PARTIES NOT APPEARING IN CAPTION

None.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES [USSC R. 29.6]

None.

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CASE #_____

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vs.

COUNTY OF NEVADA; SHERIFF WILLIAM HEAFEY; UNDERSHERIFF PAUL RANKIN; STATE OF CALIFORNIA EX REL STATE LANDS COMMISSION

Respondents

On Petition for Writ of Certiorari

To the

California Supreme Court

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There is no published opinion. The decision of the California Supreme Court appears at A1. The memorandum decision of the California Court of Appeals for the Third District appears at A2. The ruling of the trial court appears in the appendix at page A17.

JURISDICTIONAL STATEMENT

1. The decision of the California Court of Appeals for the Third District affirming the Superior court was filed on April 23, 1996. The appellate court denied a petition for rehearing on May 17, 1996. 3 Civ. C019556.

2. Petitioners petitioned the California Supreme Court for Review under California Law on May 29, 1996. Cal. Sp. Ct. No. S5053731.

3. The court denied the petition for Review on July 31, 1996.

4. Petitioner believes that 28 U.S.C. §§ 1257 and 2101(c) and Supreme Court Rule 13.1 confers *jurisdiction* on this court because the petition seeks review of an action within 90 days of the entry of an order denying discretionary review.

STATUTORY PROVISIONS INVOLVED

Article. VI.

"* * * * *

"[Cl. 1] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

4th Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5th Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be **deprived of** life, liberty, or **property, without due process of law; nor shall private property be taken for public use, without just compensation.**" [Emphasis added]

14TH Amendment (July 28, 1868)

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"* * * * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

28 U.S.C., § 2409a (1972):

" * * * * *

"(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substan-

tial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, **mineral activities**, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced twelve years after the date the State received notice of the Federal claims to the lands." [Emphasis added]

"(k) Notice for the purpose of the accrual of an action brought by a State under this section shall be—

"(1) by public communication with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

"(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

"(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the submerged Lands Act (43 U.S.C., § 1301.)

"* * * * *."

43 U.S.C., § 1301:

"When used in this subchapter and subchapter II of this chapter—

"(a) The term "lands beneath navigable waters:" means—

"(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereaf-

ter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant form the coast line of each such state and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

"(3) all filed in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

"(b) * * * * *

"(c) * * * * *

"(d) The terms "grantees and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities,, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however,* That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interest other than are describe herein and in their respective grants form the State, or predecessor sovereign;

"(e) * * * * *

"(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constitution a part of the public lands of

the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

"(g) The term "state" means any State of the Union;

"(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision, of a State, or private, or public, or municipal corporation.

42 U.S.C., § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereto to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Title 33, §§ 24 to 59t, inclusive, affecting navigability are set forth in the appendix at Pages A-20 to A-23.

California Harbors and Navigation Code, § 90, and § 100 trough 106, inclusive, affecting navigability, are set forth in the appendix at pages A-23 to A-29.

California Penal Code Provisions pertaining to criminal trespass, arrests by a peace officer, and arrests by citizens are set forth in the appendix at pages A-29 to A-30.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

A complaint was filed on September 24, 1993. Al-

leging in four causes of action, Slander of Title, Deprivation of Civil Rights, Quiet Title and Declaratory Relief. (I Original Superior Court File (OSCF) 1.[1])

On December 21, 1993, County, Heafey, and Rankin made their first appearance by way of demurrer and motion to Strike. (I OSCF 27- 86.) Plaintiff timely filed an opposition to the demurrer and motion to strike. (I OSCF 112 - 132.) The demurrer was heard and ruled on January 10, 1994. (I OSCF 156, 164.), and amended on January 25, 1994. (I OSCF 169.) An order and notice of order was duly filed. (I OSCF 172, 174.) Thereafter, County, Heafey, and Rankin answered. (I OSCF 178 - 206.) The order sustained the demurrer as to the Civil Rights Action and overruled the demurrer as to the slander of title action. (I OSCF 172, 174.)

On December 22, 1993, California served, and filed, an answer. (I OSCF 87 - 98.) and a cross-complaint to quiet title and for declaratory relief. (I OSCF 99 - 107.) Plaintiff timely filed an answer and affirmative defenses. (I OSCF 138 - 43.)

County, Heafey, and Rankin for summary adjudication (I OSCF 231), supported by: a declaration of counsel (I OSCF 235 - 43.); a separate statement[2] (I OSCF 244.); points and authorities (I OSCF 248 - 57.); Interrogatories with responses, Set One, County (I OSCF 258-63, 264-76.); and Admissions with responses (I OSCF 272-76, 277-83.). California joined with a memorandum in support. (IV OSCF 766-69.) California filed a certificate of non-opposition to Nevada's

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[1] The California court of appeal proceeded, by stipulation of the parties, on the original file from the trial court. See, California Rules of Court, R. 5.2. All such references are to that file.

[2] All references to "a separate statement" are to the Separate Statement of Undisputed Facts required by California Code of Civil Procedure, § 437c in support of, or in opposition to, a motion for summary judgment or partial adjudication of facts.

motion for summary judgment. (IV OSCF 770.) Plaintiff opposed with:[3] an opposition and memorandum (IV OSCF 822-28.); Plaintiff's Position on the Separate Statement. (IV OSCF 811-21.) County, Heafey, and Rankin replied with: a memorandum. (I OSCF 898 - 903.)

Plaintiff moved for partial summary adjudication with memorandum of points and authorities (II OSCF 318-42.), supported by: a separate statement (II OSCF 305-09.); Declarations of John Troutwine (II OSCF 310-11.), Kerry Troutwine (II OSCF 312-13.), James Lynch with exhibits (III OSCF 433-762.), and Arlene Hudson (IV OSCF 763-64.). County, Heafey, and Rankin opposed supported by: a separate statement (IV OSCF 844-53.); and an opposition (IV OSCF 854-60.). California opposed supported by: a separate statement (IV OSCF 861-67.) and an opposition (IV OSCF 868 - 890.). Plaintiff replied with a memorandum. (IV OSCF 908-10.)

California also moved for summary adjudication (II OSCF 318-42.), supported by: a separate statement (II OSCF 343-432.); memorandum (II OSCF 318-42.). Plaintiff opposed, supported by:[4] a separate statement (IV OSCF 774-95.); opposition with memorandum of points and authorities (IV OSCF 796 - 808.); Plaintiff's Position on the Separate Statement. (IV OSCF 811-21.) California Replied with: a memorandum. (I OSCF 891-97.)

All defendants objected filed objections to Plaintiff's evidence. (IVOSCF 911-23.)

The hearing was heard on August 9, 1994, and

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[3] Plaintiff's opposing papers all reference the declarations and exhibits tendered in support of Plaintiff's own motion for summary adjudication.

[4] Plaintiff's opposing papers all reference the declarations and exhibits tendered in support of Plaintiff's own motion for summary adjudication.

submitted. (IV OSCF 924; RT 8/9/94 (hereinafter, RT.)

Thereafter, a ruling issued and judgment entered for defendants. Appendix, A-17.

B. SUMMARY OF THE FACTS.

1. Introduction

This action involves the rights of the plaintiff to certain property on the South Yuba River, to wit, Starvation Bar and Jone's Bar, the easements and servitudes thereon, and the right of plaintiff to exclude others from private property. Plaintiff owns each of the properties in fee simple. (III OSCF 433 - 762.)

Plaintiff claims that both properties were derived from original grants from the United States, which includes mineral and mining rights, rights inconsistent with an understanding that the river was navigable, and for a use and purpose incompatible with navigation, and that the rights granted survive and inure to the present property owner. Alternatively, Plaintiff claims that navigable waters at common law meant, and had a technical meaning, "capable of carrying commerce",[5] and not recreation use, or any other use, there had been no action to condemn the property for other uses, and therefore, the public does not have any right to be on the river other than for navigation purposes, a purpose for which the river is not suited.

Defendants claimed the property is subject to the public trust doctrine which means that the public generally has right of access, including right to come upon the land, for purposes other than navigation, as defined at the time of the original grant.

Plaintiff also claimed that County, Heafey, and Rankin slandered Plaintiff's title by asserting that the public had a right to use, without qualification, the entire length of the river, including Plaintiff's private property on May 27, 1993, in the first cause of action

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[5] See, Calif. Har. & Nav. C., § 90 (1937).

and that they engaged in a course of conduct, under color of law, to force Plaintiff to submit to their claims that the property is in the public domain by wrongful conduct rather than by way of adjudication, or other lawful means. Defendants claimed below that the property became navigable sometime in the late 1980s by virtue of recreational use by kayakers, and then only occasionally, made possible during flood waters, which does not occur every year, then only by persons willing to risk their lives because of the white water and rocky deep gorges. What Nevada County calls navigating is in reality white water kayaking and is done only by a select few dare devils, which is certainly not done by common sense people from the general public.

California was joined as an indispensable party in order to settle the dispute as to the title of the property.

2. Plaintiff and the Property In Dispute

Plaintiff owns each of the properties in fee simple. (II OSCF 305-09; FSSUF, Third Cause, # 1; III OSCF 433 - 762; Exhibits 1, 2, 18a to 18f.) Plaintiff's properties were derived from original grants from the United States. (II OSCF 305-09; Plaintiff's Separate Statement of Undisputed Facts (PSSUF), Common Facts ## 1 and 2.) The properties have historically been used for mining since the 1850s. (II OSCF 305-09; PSSUF, Common Fact # 6; Third Cause, # 5.) Plaintiff has never acquiesced in the use of the properties by the public, or anyone else. (II OSCF 305-09; PSSUF, Third Cause # 3.)

No public entity, prior to the events herein, has claimed the South Yuba River was navigable. (II OSCF 305-09; PSSUF, Common Facts ## 8, 9.) There has been no known legal action to declare the South Yuba River at Plaintiff's properties navigable, nor has there been any legal action to impress the Public Trust Doctrine on Plaintiff's properties. (III OSCF 305-09; PSSUF, Common Facts, ## 10, 11.) The general reputation in

the community is that the South Yuba River is not navigable. (II OSCF, PSSUF, Common Facts, # 7.) Plaintiff and predecessors in interest have been plagued with trespassers, claim jumpers, and vandalism. (II OSCF 305-09; PSSUF, Common Facts ## 3, 5.) Only since 1988 has an occasional kayaker been seen upon that portion of the river, and then only during a flood stage. (II OSCF, 349-55, 59, 63; Plaintiffs' Position On California's Separate statement of Material Facts, p. 2, # 1; Pet. For Reh., pp. 1, 2.) While the Nevada Sheriff's Department caused prosecution for vandalism, it has never caused prosecution for trespass. (II OSCF 305-09; PSSUF, Common Facts, # 4.) Its policy is that the South Yuba River is subject to the so called Public Trust Doctrine, and therefore the public has right of access to the river over plaintiff's property. (II OSCF 305-09; PSSUF, Common Facts, ## 14, 15.) The Sheriff's Department cited John Troutwine for posting "No Trespassing" signs on Plaintiff's property. (II OSCF 305-09; PSSUF, Common Fact # 13.)

3. Nevada County, Heafey, Rankin's Interest and Position

a) First Cause of Action, Slander of Title

The Union published an article regarding the South Yuba River, essentially quoting Rankin that the River was accessible and open to the public. The article included specific reference to the Troutwine property, and John Troutwine in particular. (IV OSCF 811ff; Plaintiff's Position on Nevada County Defendants' Separate Statement of Undisputed Facts (SSUF), Part I, # 2.) Defendants claimed that Rankin had a right to speak to the press, and that he was a rival claimant, and a host of other defenses. The trial court overruled the demurrer. (I OSCF 172.) It granted defendants' motion for summary adjudication. (IV OSCF 938, 945.)

b) Second Cause of Action, The Civil Rights Action

In the second cause of action, under 42 U.S.C., § 1983, plaintiffs alleged that the defendants, acting under color of law deprived plaintiff, or caused plaintiff to be deprived of, a federally protected right to exclude the public from their private property, by conduct designed to cause plaintiff to allow his property to fall into the public domain by unlawful acts, rather than by Judicially recognized means. (I OSCF 1 - 15; Complaint, Second Cause of Action.) Defendants deny that a federal right was violated. The Court sustained a demurrer to this cause. (I OSCF 172.)

4. California's Interest and Position

a) Third Cause of Action, Quiet Title

The interest of California is the preservation of the public interest and the California Public Trust Doctrine. The action against California is for declaratory relief and quiet title, wherein Plaintiff seeks to quiet title in its name, and a declaration that the South Yuba river was not, at the time of the original grant, a navigable river, as then defined, at Starvation Bar and Jones Bar, and therefore the California Public Trust Doctrine was not applicable. The Court granted defendant's motion for summary adjudication. (IV OSCF 938, 945.)

b) Fourth Cause of Action, Constitutionality of Public Trust Doctrine

As an alternative, plaintiffs sought, and seeks here, a declaration that the California Public Trust Doctrine is unconstitutional either facially, or as applied, in the present context because the South Yuba river was not, at the time of the original grant, a navigable river, as then defined, at Starvation Bar and Jones Bar, and therefore the subsequent application of the California Public Trust Doctrine would constitute a taking. The Court granted defendant's motion for summary adju-

dication.

SUMMARY OF ARGUMENT

1. The California Courts' decision in upholding summary judgment for defendants can be reached if at all, only by finding, inconsistent with this court's holdings, that the State, by judicial fiat, can change the character of property without compensation, as Plaintiff did present, on the first cause of action for slander of title, sufficient evidence to raise a genuine triable issue of fact which defeats defendants' motion for summary judgment.

2. The California Courts' decision in upholding summary judgment for defendants can be reached if at all, only by finding, inconsistent with this court's holdings, that the State, by judicial fiat, can change the character of property without compensation, as Plaintiff's second cause of action for deprivation of federal rights under color of law does state facts sufficient to constitute a cause of action against the demurring defendants.

3. The California Courts' decision in upholding summary judgment for defendants can be reached if at all, only by finding, inconsistent with this court's holdings, that the State, by judicial fiat, can change the character of property without compensation, because Plaintiff's properties, originally granted by the United States under common law property rules in the 1860s, are held free and clear of the California Public Trust Doctrine first judicially recognized in the 1960s.

4. The California Courts' decision in upholding summary judgment for defendants can be reached, if at all, only by finding, inconsistent with this court's holdings, that the State, by judicial fiat, can change the character of property without compensation, therefore California's Public Trust Doctrine is repugnant to the 5th Amendment "taking without due process and just compensation" clause rendering it void as

applied to Plaintiff's properties.

5. The California Courts' decision in upholding summary judgment for defendants can be reached if at all, only by finding, inconsistent with this court's holdings, that the State, by judicial fiat, can change the character of property without compensation, therefore California's cross-claim to quiet title in itself is time barred under 28 U.S.C., § 2409a, which provides a 12 year limitations of actions to quiet title on property derived from the United States Government.

Conclusion. Based upon the foregoing, this court should grant the writ of *certiorari*, and reverse summarily and remand for further consideration, or set the matter for briefing and argument on the merits.

ARGUMENT

I.

THE CALIFORNIA COURTS' DECISION UPHOLDING THE JUDGMENT FOR DEFENDANTS CAN BE REACHED ONLY BY FINDING, INCONSISTENT WITH THIS COURT'S HOLDINGS, THAT THE STATE, BY JUDICIAL FIAT, CAN CHANGE THE CHARACTER OF PROPERTY WITHOUT COMPENSATION

A. This Court Has Held, In A Series Of Decisions, That A Regulatory Taking Is Repugnant To The 5th Amendment

The State of California does hold all of its navigable waterways and the lands under them "as trustee of a public trust for the benefit of the People." *Goldberg v. California*, 67 Cal.2d 408 (1967), 416-17. Notwithstanding, when California attempted to enforce the public trust doctrine as to obviously navigable waters, it was held to be void insofar as a taking of vested rights was concerned without compensation. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), 831-32. The court's reasoning was preceded in an-

other case originating from California in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and followed subsequently in *Dolan v. City of Tigard*, 129 L.Ed.2d 304 (1994). This court has also held that the right to transfer an estate cannot be abridged. *United States v. Perkins*, 163 U.S. 625, 626-28 (1896).

The portion of the South Yuba River in dispute was originally granted[6] by the United States to plaintiff's predecessors in interest for mining claims, a use in compatible with navigation,[7] as then understood.

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[6] At common law, on the high seas, where navigation was a right, there was no right to stray, or for recreational use, unless expressly granted. Exhibit 14a, III OSCF p. 373, # 687. On tidal rivers, the test was that if the river was subject "to the ordinary tides and navigable as such," it was navigable, but if "a petty stream, navigable only at certain periods of the tide, and then only for a short time, and by very small boats, it may be presumed it never has been a public navigable river (k)" Exhibit 14a, III OSCF p. 391, # 741. As to non-tidal rivers "The public may have a right to navigate non-tidal rivers, but there is no common law right to do so. Such right as the public has can only have arisen by grant from the owners of the soil of such rivers, or by immemorial usage, or by an Act of Parliament, and the right to navigate is established by evidence similar to that which raise the presumption of a right of way on land (o)." Exhibit 14a, III OSCF p. 398, # 760. "The right of navigation in non-tidal waters **when acquired** by the public is simply a right of way similar to a right of way on land (l). It may extend over the whole width of the watercourse, or restricted to a particular part thereof (j). It carries with it **no right to** the soil, or any right of fishing,, or fowling or of **recreation** over the soil (k). [Emphasis added.] Exhibit 14a, III OSCF p. 406, # 784. Exhibit 14a are treatises and statutes of England in existence at the time the United States became a sovereign.

[7] Calif. Har. & Nav. C., § 90 (1937) (See appendix, A-25) defined navigability in terms of "carrying product" which was consistent with the common law at the time of the original grant. Indeed, the California Court's conceded a

Because the only justification of terminating plaintiff's right to exclude others represents a change in the character of Plaintiff's property interest, in violation of the *ex post facto* clause, and inconsistent with this court's views on taking, review and clarification in this court is required to settle this important issue of law which will necessarily have significant impact on a huge number of private California riparian owners.

B. THE LOWER COURTS' RULINGS WITH RESPECT TO SLANDER OF TITLE IS INCONSISTENT WITH THIS COURT'S VIEWS, AND THEREFORE REVIEW IS APPROPRIATE.

This court has held that publication of false stories by government officials is actionable.[8] *Buckley v. Fitzsimmons*, 125 L.Ed.2d 209 (1993). Slander of title involves a false publication of disparaging statements. (*Seeley v. Seymour*, 190 Cal.App.3d 844, 848 (1987).)

Plaintiff alleged that Rankin's statements were (1) made at a time that he had no right, title, or interest, (2) that he claimed, on behalf of the public, a legal right to use the property; (3) the statement was false; (4) that Rankin had no basis for believing it to be true; and (5) damages. In support thereof, there was evidence presented that Rankin did make the statements. That title was derived from a United States grant, and currently vested in plaintiff; that there was no action

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change from the common law to effect the result. App., A-18, ¶ 2; *Bohn v. Albertson*, 107 Cal.App.3d 738(1951); *People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040, 1045-48 (1971); Respondent's 3rd DCA Brief, p. 14. The legislation has not changed, only judicial interpretation.

[8] While this claim appears to be a state claim, it is, the ruling is nevertheless subject to review of a federal question for two reasons: title to the property was raised as a federal question; it is but an alternative to, and part of, the Civil Rights claim. As the court must have necessarily decided the federal question adversely to reach the result it did, there is a federal question for review.

of record showing either a voluntary, or involuntary. transfer to the State. That there was no valid judgment from a court having jurisdiction over the subject property and owner thereof declaring the property to be subject to the Public Trust Doctrine.

The only basis for the Courts' decisions is premised on a belief that the property is in fact subject to the "Public Trust Doctrine", and therefore no slander occurred.

But as stated in A, above, the assumption by the California Courts that the Public Trust Doctrine is good as against Petitioner appears to be inconsistent with this court's views, and therefore review is appropriate.

C. THE LOWER COURTS' RULINGS WITH RESPECT TO THE CIVIL RIGHT'S CLAIM IS, AT LEAST IN PART, INCONSISTENT WITH THIS COURT'S VIEWS, AND THEREFORE REVIEW IS APPROPRIATE FOR CLARIFICATION AS APPLIED TO PROPERTY RIGHTS

A civil rights case may be brought in state court, but its contours, and rulings thereon are controlled by federal law, to the exclusion of State Law. *Martinez v. California*, 444 U.S. 277 (1980). Interference with possessory rights states a cause of action. *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983); *Soldal v. Cook County*, 121 L.Ed.2d 450 (1992). Defendants raised the defense of failure to exhaust state remedies. *See, e.g., Williamson County Reg. Planning v. Hamilton Bank*, 473 U.S. 172, 194,n.13 (1985). The Court ruled in favor of defendants.

Congress, by Statute, requires convicted adults to exhaust state remedies before bringing a Civil Rights Action, and even then, if there has been no exhaustion, the court is limited to determining first whether or not there are state remedies, and placing the case on stay while the remedies, if any, are exhausted. 42 U.S.C., § 1997e(a). This Court has expressly held that the exhaustion requirements for other than incarcer-

ated adults does not apply. *Patsy v. Board of Regents*, 457 U.S. 496 (1982). However, in reliance on *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Williamson, supra*, courts have generally held, with respect to the taking of property, that there can be no civil rights action unless there has been exhaustion. *Parratt* dealt with an adult inmate of a penal institution who had his property taken. While the *Parratt* court does not address § 1997e, it would appear that the subsequent ruling of this Court in *Patsy* limits the holding of *Parratt* to prisoner cases. Indeed, the *Parratt* decision is entirely consistent with both § 1997e and *Patsy*. *Williamson* appears to be an aberration, and should be reconsidered, or distinguished.

In this case, Plaintiff alleged numerous problems, including one arrest, and once being prosecuted for posting "No trespass" signs on his property in an effort to exclude others from using his private property. That was the basis of the civil rights claim, that the defendants, under color of law, were preventing Plaintiff from excluding others, which is a federally protected right. The court sustained a demurrer.

This court has held that a person has the right to exclude others subject only to persons entering upon the land to exercise police powers either with a warrant, or with probable cause under circumstances justifying the absence of a warrant. *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *citing Kaiser Aetna v. United States*, 444 U.S. 164, 174-175 (1979); ("one of the essential sticks in the bundle of rights that are commonly characterized as property - the right to exclude others."); *United States v. Perkins*, 163 U.S. 625, 627-628 (1896).[9]

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[9] *Hestor v. United States*, 265 U.S. 57 (1924), 59; relied on a purported common law rule. However, a check of the cited portions of Blackstone relied on by *Hestor* reveals a discussion on Burglary. 4 Blackstone's. Commentaries. (Vol. 4) 23, 25, 26. Obviously, there is a distinction between open

It would appear that Plaintiff did in fact state a cause of action under 42 U.S.C., § 1983, but it remains for this court to determine whether, on this factual pattern, stated facts upon which relief could be granted under 42 U.S.C., § 1983, and if so, whether exhaustion is required.

D. THE LOWER COURTS' RULINGS WITH RESPECT TO QUIET TITLE, STATUTE OF LIMITATIONS, AND DECLARATORY RELIEF IS INCONSISTENT WITH THIS

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fields, no burglary possible, and a home, where a burglary can be committed. That was not to say that at common law a person could not exclude others from his land, for the concept of trespass to lands was firmly entrenched in the common law. 3 Blackstones. Commentaries. (Vol. 3) 208-211. As Blackstone observed, "Trespass, in it's largest, and most extensive sense, signifies any transgression ... whether it relates to a man's person, or his property." Id, at 208. The court has recognized this right as a right to exclude others. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).) Congress has declared the *Hestor* an incorrect statement of the law. *Outdoor Agricultural Operations*, House Report No. 99-682(V), p. 6., *reprinted* [1986] U.S. Code Cong. & Ad. News, p. 5792. Thus, Congress now requires either consent or a subpena before open fields may be searched. P.L. 99-603, Title I, Part B, Sec. 116, Nov. 6, 1986, 100 Stat. 3359; 8 U.S.C., § 1357(d). See § 1375(d). See § 1375(d) which provides, "Notwithstanding any other provision of this section other than paragraph (3) of subsection (a), an officer or employee of the Service may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States." By virtue of the equal protection implicit in the 5th Amendment's due process clause, or the equal protection clause of the 14th Amendment, the rule applies to all situations. *E.g., Bolling v. Sharpe*, 347 U.S. 497 (1954).

COURT'S VIEWS, AND THEREFORE REVIEW IS APPROPRIATE.

This Court's holding which preclude governmental agencies from forcing a taking without compensation are directly applicable here.[10] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), 831-32; *Dolan v. City of Tigard*, 129 L.Ed.2d 304 (1994).

The court denied Plaintiff's motion for summary judgment on the quiet title action that the property was held free and clear of California's Public Trust Doctrine, and granted California's motion that it was so subject. Similarly, the Court denied Plaintiff's motion with respect to a declaration as to the Constitutionality of the Public Trust Doctrine as applied, and to the statute of limitations, and granted California's motion on the same subject.

Because of this Court's views in A. above, it is clear that the courts could reach the result it did by ignoring this court's views. It is therefore necessary and proper that this court grant review to determine whether, and to what extent, California can divest a property owner of the right to exclude others from his property.

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[10] In point of fact, even California Courts recognized early in California History the legislature could not achieve a legislative taking. *Billings v. Hall*, 7 Cal. 1 (1857). Since the 1960s, the court has been attempting to do that which they prohibited to the Legislature, and without legislative approval. This Court has repeatedly held that legislative approval before court action is the desired norm. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Death penalty for minor without benefit of legislative sanction unconstitutional); *Colonnade Corp. v. United States* (1970) 397 U.S. 72 (Statutory right to search; right enforceable by fine; no express statutory waiver of 4th Amendment; Search **bad**) There has been no change in legislation. App., A-23 to A-29.

CONCLUSION

WHEREFORE, for all, or any one of, the foregoing reasons, this court should grant the writ of *certiorari* to the court, and summarily reverse and remand, or set the matter for briefing and argument, and such other and further relief as the court deems just and proper.

Dated: October 15, 1996

Respectfully submitted,

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APPENDIX

Third Appellate Dist. No. C019556

S053731

IN THE SUPREME COURT OF CALIFORNIA

TROUTWINE FAMILYH TRUST, Cross-Defendant and Appellant	SUPREME COURT FILED
v.	JUL 31 1996
COUNTY OF NEVADA, Respondent	Robert Wandruff Clerk
STATE OF CALIFORNIA EX REL STATE LAND COMMISISON, et al, Cross-Complainants and Respondents	DEPUTY

Petition for review DENIED.

The request for an order directing publication of the opinion is denied.

Brown, J. did not participate.

GEORGE

Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF CALIFORNIA

IN AND FOR THE THIRD DISTRICT

(Nevada)

TROUTWINE FAMILY TRUST, Plaintiff, Cross-Defendant and Appellant v. COUNTY OF NEVADA, Defendants and Respondents STATE OF CALIFORNIA EX REL STATE LAND COMMISISON, et al, Defendants, Cross-Complainants and Respondents	3 Civ. C019556 (Super.Ct.No. 49952) FILED Apr 23 1996 COURT OF APPEAL-THIRD DISTRICT Robert Liston, Clerk DEPUTY

This case is about an old river, old ideas, and old law. John and Kerry Troutwine have owned property along the South Yuba River for over 30 years. During that time, river enthusiasts have enjoyed kayaking on the river. Other members of the public, however, have trespassed on the Troutwine property often burglarizing and vandalizing the cabin and staking mining claims to the land. The Troutwines have been vigilant in protecting their private property rights, while environmentalists and river

[1]

enthusiasts pursued the public's right to protection and enjoyment of the river.

Legally, the case turns on navigability of the river and law established a century ago. Factually, the dispute involves the publication of remarks made by the undersheriff in Nevada County that the public had the right to navigate the South Yuba River. In 1993 the Troutwine Family Trust Brought the underlying lawsuit against the county, the sheriff, and the undersheriff for slander of title and for deprivation of the Troutwines' civil rights and, joining the state in two of

their causes of action, to quiet title and to obtain a declaration of their right to exclude the public from the river and their land. The state cross-complained.

The Troutwines appeal the summary judgments granted the state and the county, pursuing their passionate fight for what they perceive is their river and their land and their belief they have a constitutional right to enjoy both without intrusion. The law defining the right to enjoy the river, however, is very different from the law defining the right to enjoy the land. The public has the right to enjoy the river; the Troutwines' legitimate grievance against those who transgress their right to exclusive enjoyment of their land is outside the scope of this lawsuit. Because the right to enjoy the river turns on navigability under state law and the Troutwines have failed to raise a triable issue of fact, we affirm the summary judgments.

[2]

FACTS

The South Yuba River flows west through a remote scenic canyon from the Highway 49 bridge toward a covered historic bridge at Bridgeport. John and Kerry Troutwine purchased 30 acres on both sides of the river at Starvation Bar and 35 acres on the south side of the river at Jones bar in the mid-1960s. The original federal patents to the property at Starvation Bar and Jones Bar were executed in the 1890s to the Troutwines' predecessors in title. There has been no judicial or administrative determination that the river, as it runs through the Troutwine property, is navigable. The Troutwines later transferred title to their river properties to a family trust.

The Troutwines allege a history of trespassing on their properties. Although they have maintained no trespassing signs, several trespassers attempted to establish mining claims on the properties at Starvation Bar and Jones Bar in the 1980s. Often these trespassers were armed. Mr. Troutwine, also armed, chased

trespassers off his land. Teenagers vandalized the cabin at Starvation Bar and were arrested and convicted. There were other incidents involving trespassers riding trial bikes or horses on the Troutwines' properties.

At least by the 1980's the public began navigating the river in kayaks and rafts between January and June. Mr. Troutwine admitted observing kayakers on the river at Starvation Bar. He recorded a consent to use this portion of the river expressly authorizing public navigational and recreational use.

[3]

' On May 29, 1993, a local newspaper published an article about the controversy surrounding a proposal to designate the South Yuba River as a wild and scenic river. The article described the tension between environmentalists and river enthusiasts, on the one hand, and private property owners, on the other. Because the article is the focal point of at least two of the causes of action, we provide a lengthy excerpt: "There is little doubt that these problems will increase as the river gains popularity as a recreation destination. But the question of remains whether wild and scenic designation will help or exacerbate the problem. [¶] River users already have the right to use the entire length of the river. The Nevada Count Sheriff's Department operates under a ruling by a judge that says the South Yuba is considered a navigable river and, therefore, everything below the high-water mark is public property, said Undersheriff Paul Rankin. [¶] This causes problems for some property owners along the river. John Troutwine of Nevada City has had confrontations with river users and even the police over public use of the river channel. [¶] 'None of the property owners has a problem with some high-minded person walking down the river looking at it,' he said. 'But if you open it up to them you also open it up to the burglars, the tree cutters, the fire starters and the

rubbish dumpers.' [¶] Troutwine claims his property has been burglarized some 22 times. Signs he has put up to keep the public out have been unsuccessful. [¶] 'This is a kind of trend to socialism, 'Troutwine said. 'They want the right to sue property owner's property without paying for it.'

[4]

[¶] For their part, river supporters say experience with other wild and scenic rivers shows that designation actually reduces trespassing and vandalism. When a river is designated wild and scenic, the river management agency, in this case the Forest Service, would develop a river management plan to deal with these problems and, gradually, more money should become available for controlling unregulated recreational use, Haughey said."

In September 1993, the Troutwines as trustee for the family trust filed a complaint against Nevada County, William Heafey, the sheriff, and Paul Rankin, the undersheriff for slander of title and violation of federal civil rights. The complaint also stated two causes of action against the State of California and the County: one to quiet title and the other for declaratory relief. The trial court granted the county's and individual defendants' demurrer to the civil rights claim. The Troutwines never amended the cause of action. The court granted the defendants' motion to strike paragraphs describing Mr. Troutwine's personal background and the history of trespassers on the land.

All parties filed competing summary judgment motions. The Court granted the defense motions and denied the Troutwines' motion for summary judgment or summary adjudication. The Troutwines appeal.

DISCUSSION

I.

The Troutwine's fundamental mistake is beginning with the wrong question. They ask whether the South

Yuba River was

[5]

navigable under federal law at the time their predecessors in title received a grant to the land form the United States government. Their inquiry is predicated upon the erroneous notion that federal law applies, and pursuant to federal law, the river was not navigable at the time title was passed from the government to their predecessors.

The Attorney General, on the other hand, focuses on the dispositive issue. Is there a triable issue of fact regarding the navigability of the South Yuba River under the state law at the time of the summary judgment motions? The trial court properly applied the state test of navigability, thereby triggering the state's constitutional duty to safeguard the public trust in its navigable waterways. We begin with a synopsis of the important historical and constitutional principles which curtail private property rights in favor of the public trust.

"'By the law of nature these things are common to mankind— the air, running water, the sea and consequently the shores of the sea.' [Citation] From this origin in Roman Law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.'" [Citation.] The State of California acquired title as trustee to such lands and waterways upon its admission to the union . . . ." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 433-434.)

"Spanish law and subsequently Mexican law also recognized the public trust doctrine. [Citations.] Commentators

[6]

have suggested that the public trust rights under His-

panic law, guaranteed by the Treaty of Guadalupe Hidalgo, serve as an independent basis for the public trust doctrine in California." (*Id.*, at p. 434, fn. 15.)

The nature and scope of the State's charge to protect the trust on behalf of the people maintains the same vitality today as it did in the mid and late 1800's. "Navigability . . . is the touchstone in determining whether or not the public trust applies." (*State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 228.) In 1995, the California Supreme Court reiterated the principles enunciated by the United States Supreme Court in 1982. "'The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the land and waters remaining. . . . . The State can no more abdicate its trust over property in which he whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except; in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police power in the administration of government

[7]

and the preservation of peace.'" (*State of Cal. Ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 63-64, quoting *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 452-53.)

The Troutwines contend the public trust is not applicable because their title derives from an original

grant from the United States. The United States patents, in the absence of reservations or restrictions, could not pass title to navigable waterways. (*Hardin v. Jordan* (1891) 140 U.S. 371, 380.) "California's sovereignty and jurisdiction over navigable waters and lands underneath them, makes it unnecessary for the federal government, in granting patents to lands riparian to such waters, to reserve such sovereign rights and hence the lack of such reservations in the patents to the lands riparian to the river is irrelevant to the issue of navigability." (*People ex rel. Baker v. Mack* (1971) 19 Cal.App.3d 1040, 1050.)

The Troutwines insist that California's adoption of the common law at the time of its admission to statehood in 1850 defines navigability in this state. "Only waters where the tide ebbed and flowed were considered to be navigable in England. . . . . [T]he terms 'navigable' and 'tidal' became synonymous; tidal (navigable) waters came to mean public waters, while nontidal (and in England nonnavigable) waters came to mean private waters." (*State of California v. Superior Court (Lyon)*, supra, 29 Cal.3d at p. 218.)

"The common law is dynamic, not a monolith admitting of no variation. It was not frozen in time as of 1850." (*State of*

[8]

Cal. Ex rel. State Lands Com. v. Superior Court, supra, 11 Cal.4th at p. 75.) Hence, the law, like the river, has been nourished and changed over time. "[O]ur courts have never adhered slavishly to common law doctrines if they were unsuitable to the circumstances of our people or if the conditions were those never contemplated by the common law." (*State of California v. Superior Court (Lyon)*, supra, 29 Cal.3d at p. 220.) "Because of the difference between rivers in England and those in the United States, [the common law rule of navigability] was not adopted in this country." (People ex rel. Baker v. Mack, supra, 19 Cal.App.3d at p. 1045.)

The Troutwines assert the navigability of the river at the time the United States patent was granted is determinative. Since the river was used only to facilitate mining, they conclude it was not navigable at the relevant point in time. They are wrong.

"It has been held that navigability is to be determined by the condition at the date of the admission of California to the Union. [Citations.] However, this rule is limited to the title to the lands under the water and riparian rights. Navigability for the purpose of commerce may arise later." (*Bonn v. Albertson* (1951) 107 Cal.App.2d 738, 742.]

Does federal or state law define navigability and the scope of the public trust? "[T]he federal test of navigability, involving as it does property title questions, has always been much more restrictive than state tests dealing with navigability for purposes of the right to public passage." (*People ex rel.*

[9]

Baker v. Mack, supra, 19 Cal.App.3d at pp. 1050-51.) Exclusive jurisdiction of the waters resides in the state when not in conflict with federal dominion, which may establish a more liberal right of passage. (*Pacific Gas and Electric Co. v. Superior Court* (1983) 145 Cal.App.3d 253, 256.) Since there are no competing federal interests, the state law of navigability prevails.

In California, the public right of access to navigable waters is of constitutional origin. (*Id.*, at pp. 257-58.) "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a . . . navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof." (Cal. Const., art. X, § 4.)

Case law applying the constitutional mandate confirms that a river or stream is navigable in law if it is navigable in fact. Moreover, California has adopted an expansive definition of navigability. Any waters which can be used for recreation are navigable and can be used by the public. (*State of California v. Superior Court (Lyon)*, supra, 29 Cal.3d at p. 229.) This court has consistently applied this definition. (*People ex rel. Baker v. Mack, supra,* 19 Cal.App.3d at p. 1044, we wrote: "It hardly needs citation of authorities that the rule is that a

[10]

navigable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes." The Fall River is navigable because it is capable of boating for pleasure. (*Ibid.*) Similarly, we found the South Fork of the American River navigable because it was used for whitewater rafting. (*People ex rel. Younger v. County of El Dorado* (1979) 96 Cal.App.3d 403, 405) and Lake Shasta navigable because it was used for small craft recreational boating. (*Pacific Gas and Electric Co. v. Superior Court, supra,* 145 Cal.App.3d at p. 258.) Moreover, navigability may be seasonal. (*Bess v. County of Humboldt* (1992) 3 Cal.App.4th 1544, 1548, fn. 2.)

The state and county presented evidence members of the public used the South Yuba River for rafting and kayaking from January through June. Mr. Troutwine conceded he had observed kayakers on the river. The Troutwines presented no contrary evidence. The trial court properly concluded there were no material triable issues of fact. According to the uncontradicted affidavits submitted in support of the motion for summary judgment, the South Yuba River, as it runs through the Troutwines' property at Starvation Bar and Jones Bar, is navigable in fact, and therefore, is navigable in law.

The Troutwines assert two additional obstacles to

the judgments entered on behalf of the county and the state. They claim the quiet title action is barred by a twelve year statute of limitations and assertion of the public trust constitutes a taking of private property without just compensation. Neither contention has merit.

[11]

Relying on *State of California v. Yuba Goldfields, Inc.* (9th Cir. 1985) 752 F.2nd 393, the Troutwines contend the twelve year statute of limitations set forth in the Quiet Title Act (28 U.S.C., § 2409a, et seq.) bars the state's cross-complaint for declaratory and injunctive relief and to quiet title. *State of California v. Yuba Goldfields* is inapposite. It has absolutely nothing to do with the public trust over navigable waterways. Rather, it involved the belated attempt by the State of California to obtain title to the riverbed of the Yuba River. At the turn of the century, California had contributed one-half of the acquisition costs of a twelve mile stretch of the riverbed. The United States took title as sole grantee. In 1978 California brought a quiet title action in federal court and the district court dismissed the case against the United States because the statute of limitations contained in the Quiet Title Act barred the claim. The dismissal was upheld on appeal.

Unlike *Yuba Goldfields*, this is a state action under the public trust doctrine. The State is not seeking to quiet title to the riverbed. The state, as trustee and guardian of the public interest in preserving the right to use and enjoy navigable waterways in the state, seeks merely to enforce and protect the trust's recreational easement. The Troutwines have cited no statute of limitation which applies to enforcement of the public trust and we have found none. Moreover, we agree with the Attorney General the right of the people of California to use the navigable waters of the state is of constitutional origin and protected by statute.

(Harbors and Navigation Code, § 131 and

[12]

Pen. Code, § 370.) Obstruction of access or passage to navigable waters constitute a public nuisance. (Civ. Code, §§ 3479, 3480.) "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." (Civ. Code, § 3490.)

Hoping to capitalize on decisions of the United States Supreme Court restricting regulatory taking by the government, the Troutwines argue that the state's enforcement of the public trust constitutes a taking of their property. (*Dolan v. City of Tigard* (1994) 512 U.S. ___; 129 L.Ed. 304; 114 S.Ct. 2309; *Nollan v. California Coastal Commission* (1987) 483 U.S. 825.) They insist the power to exclude the public "is traditionally considered one of the most treasured strands in an owner's bundle of property rights." (*Lorretto v. Teleprompter Manhattan CATV Corp.* (1982) 102 S.Ct. 3164.) Hence, according to the Troutwines, the state cannot usurp their right to exclude others, as an incident of their right to own private property, without proceeding in eminent domain. Again their premise is fallacious for it assumes a right they never had.

"[T]he law of California burdens property riparian or littoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters, and that 'when the act [of the state] is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience.'" (*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d

[13]

408, 420.) The Troutwines' river properties are burdened with a servitude for navigation and have been so burdened since the time the federal patent was granted to their predecessors in title. The state is not

seeking to take the Troutwines' property, or any incident of ownership, but to enforce the servitude on behalf of the public trust. The state's assertion of its trust rights does not constitute the taking of private property. (*State of California v. Superior Court* (*Lyon*), *supra*, 29 Cal.3d at p. 131; (*State of Cal. Ex rel. State Lands Com. v. Superior Court, supra,* 11 Cal.4th at p. 76.) Moreover, the Troutwines retain the right to utilize their lands "in any manner not incompatible with the public's interest in the property." (*State of California v. Superior Court (Lyon), supra*, 29 Cal.3d at p. 232.)

Nor do any of the relatively recent taking cases of the U.S. Supreme Court dictate a different result. Cumulatively, these cases stand for the basic proposition that "the 'Takings Clause' reaches beyond direct appropriation of private property and that while the use of property may be regulated, if the regulation goes too far it will be considered a taking." (*Tahoe Keys Property Owners Assn. V. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1475.) None of these cases involves the public trust over navigable waterways. Rather they involve land use regulation which potentially deprives the landowners of all economically beneficial or productive use of the land. Here the Troutwines retain the right to use and enjoy their land. That right is simply limited by the commensurate right of the

[14]

public to navigate the South Yuba River. We find there has been no taking so as to trigger a right to compensation.

II.

The finding of navigability disposes of the Troutwines' slander to title claim. Slander of title involves a false publication of disparaging statements. (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 848.) The Troutwines maintain the undersheriff's published remarks that the public had the right to use the South Yuba

River and that a judge had ruled the river was navigable constitute slander of title. The finding of navigability, however, precludes a finding of falsity. The undersheriff correctly reported the public's right to navigate since the underlying fact was true: the South Yuba River is navigable and the public is entitled to enjoy the river for recreational purposes. There was no slander of title.

III.

Tenacious in their multi-faceted fight for private property rights, the Troutwines claim the Court erred by granting defendants' demurrer to their civil rights cause of action. Their civil rights claim is predicated on the state's wrongful deprivation of their right to exclude the public from the river. As discussed at length above, the river is navigable, and therefore, the Troutwines have no right to interfere with the public servitude for recreation. Consequently, there was no interference with their "bundle of property rights" and no potential civil rights claim.

[15]

The trial court properly concluded that the Troutwines did not have the right to exclude the public from navigating and enjoying the river. Old law impressed a public trust in the river because it was navigable. Old ideas often die hard. The Troutwines do not have to part with title to their land but they are obliged by the constitution and statutes of this state to share the river with those who love the river as they presumably love their land.

The judgments are affirmed. Respondents shall recover their costs on appeal.

Raye, J.

We concur:

Scotland, Acting P.J.

Brown, J.

[10]

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BRICE G. BOLINGER NEVADA
COUNTY CLERK
By: DOLORES SPOINDLER
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NEVADA

-oOo-

TROUTWINE FAMILY TRUST, et al, Plaintiffs, v. COUNTY OF NEVADA, et al, Defendants. AND RELATED CROSS ACTION(S)	CASE NO. 49952 RULING ON MOTION FOR SUMMARY JUDGMENT AND FOR BIFURCATION

The three motions for summary judgment or summary adjudication brought by the plaintiffs, the State of California and the County of Nevada and the motion to bifurcate brought by County of Nevada were heard and submitted on August 9, 1994.

Based on a review of the papers on file, the legal authorities and oral arguments, the court denies plaintiffs' motion for summary judgment and grants the State of California's and County of Nevada's motions for summary judgment. County's motion for bifurcation is rendered moot by the rulings

[1]

on summary judgment motions.

The key issue before the court is the navigability of the South Yuba River between the Highway 49 bridge to Bridgeport over the subject properties located at or near Jones Bar and Starvation Bar.

The Court agrees with the State of California's position that navigability in this case is defined by California law which has evolved over the years to encompass changing public needs. Because there is no conflict with the federal dominion, the federal test of commercial navigability does not apply.

If the South Yuba River between Highway 49 and Bridgeport is now navigable in fact by small recreational crafts during some part of the year, then the State holds a navigational easement in law on behalf of the public. The river may be used by the public up to the high water mark for various recreational purposes and environmental values of the river may be protected. Recreational purposes include but are not limited to fishing, hunting, bathing, swimming, boating (which includes portage, scouting, brief rests, anchoring and standing on the bottom), scenic enjoyment and general recreational purposes. This list is not exhaustive.

Plaintiffs submit no admissible evidence showing lack of navigability. Plaintiffs' Facts 6 and 7 do not contain evidence that the river is not navigable by small recreational craft at least part of the year. In any event, Exhibits 14a, 14b, 16, 17

[2]

and 22 do not constitute admissible evidence and the objections of State and County are sustained.

Plaintiffs argued at the hearing that objections to their evidence were late and should not be considered. However, Code of Civil Procedure Section 437c(d) states objections may be made at the hearing. Since objections were filed herein before the hearing they are timely.

The State submits evidence in facts 1, 2 and 4 from five different people showing that members of the public have navigated the South Yuba River in kayaks and drafts between the Highway 49 bridge to Bridgeport at various times between January and June. It

shows that Plaintiff John Troutwine has seen persons navigating the Starvation Bar area of the river in Kayaks. The State also presents evidence in Facts 3, 5, 8 and 9 showing a flow sufficient to support navigation by kayak or raft exists during the winter and spring months.

The uncontradicted evidence shows that the South Yuba River is in fact navigable between the Highway 49 bridge and Bridgeport. Therefore, as a matter of law a navigable easement with all its attendant uses is found to exist over the subject properties. In reaching this conclusion, the court has determined that plaintiffs' remaining arguments are without merit, including but not limited to the constitutional issues presented.

Based on the above, the court declares the State of California holds a navigational easement in trust for the benefit of the people of the State of California over the subject

[3]

properties between the Highway 49 bridge and the bridge at Bridgeport up to and including the high water mark. Title to the navigational easement over the subject properties is quieted to the State. Plaintiffs, their agents, successors, assigns, heirs and all the person unknown claiming any legal or equitable right, title, estate, lien or interest in the subject property are enjoined from:

1. Asserting that the public has no interest in the waters of the South Yuba River, and the banks adjacent thereto up to the high water mark as the river crosses the subject property.

2. Taking action to obstruct or to preclude members of the public from navigating or exercising incidents of navigation described above on the waters of the South Yuba River as it flows across the subject properties between the Highway 49 bridge and Bridgeport.

3. Placing signs which claim that no public interest or right exists in the waters of the South Yuba River and which seek to discourage lawful use of the waters of the South Yuba River and the banks adjacent thereto to the high water mark on the subject property.

In addition to disposing of plaintiffs' and the State's causes of action on the issues of quiet title, declaratory relief and injunctive relief, this ruling disposes of plaintiffs' causes of action for slander of title against County of Nevada, ,Sheriff William Heafey, and Undersheriff Paul Rankin. As a matter of law, if the State of California hold a navigational easement over the

[4]

subject properties, the statements attributable to the defendants cannot constitute slander of title. Therefore, judgment shall be entered against the plaintiffs on their complaint as to all defendants and in favor of the State of California on its cross-complaint against all cross-defendants.

Although conceivably rendered moot by the above ruling, the court addresses County of Nevada's motion for summary adjudication on the slander of title cause of action on the ground of lack of damages. The court notes moving party did meet its initial burden of proof by showing a lack of pecuniary damages. However, it did not negate the alternative element of damage, the expense of clearing title, which includes attorney's fees and costs. *See Glass v. Gulf Oil* (1970) 12 Cal.App.3d 412. To the extent it remains an issue, the County's motion for summary adjudication on the slander of title cause of action based on the lack of damages is denied.

Costs are awarded to the State of California and the County of Nevada against plaintiffs and cross-defendants.

Based on the above ruling, the pre-trial conference and trial dates are vacated.

[5]

State of California is to prepare a formal order and a proposed judgment dealing with all issues presented on the motions for summary judgment or summary adjudication and for bifurcation in accordance with this ruling and California Rules of Court including Rule 391.

Dated: August 10, 1994.

/s/ Carl F. Bryan, II

CARL F. BRYAN, II
Judge of the Superior Court

[6]

Title 33, Harbors and Navigation

SUBCHAPTER II—WATERS DECLARED NONNAVIGABLE: CHANGE OF NAME[1]

§ 21 (1921) Bayou Cocodrie, Louisiana

§ 22 (1917) Bayou Meto, Arkansas

§ 23 (1923) Bear Creek, Mississippi

§ 24 (1910) Big Tarkio River, Missouri

§ 25 (1916) Cache River, Arkansas

§ 26 (1916) Calumet River, Cook County, Illinois, old channel

§ 26a (1913)Additional Portion of Calumet River, old channel, abandoned as navigable river

§ 26b (1937) Portion of Calumet River, Chicago as nonnavigable stream.

§ 27. (1924)Chicago River at Chicago, Illinois

§ 27a (1935). Chicago River, West Fork of South Branch

§ 27b (1959). Chicago River, West arm of South Fork of South Branch

§ 28 (1916). Crum River; old channel at mouth, Delaware Bay

§ 29 (1900). Cuivre River, Missouri

§ 29a (1935). East River, Wisconsin

§ 30 (1905). Grand River, Missouri, above Brunswick

§ 31 (1894). Iowa River, Iowa, above Toolsboro

§ 32 (1922). Lake George, Mississippi

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[1] 33 U.S.C., §§ 21 to 59t, inclusive are those rivers which Congress has declared to be nonnavigable. Congress does not appear to have declared any inland waters as being navigable. The names only are given, leaving out the description.

§ 33 (1919). Little River, Arkansas, from Big Lake to Marked Tree

§ 34 (1913). Mill Slough, Oregon

§ 35 (1901). Mississippi River, West Channel, opposite La Crosse, Wisconsin

§ 36 (1917). Mosquito Creek, South Carolina

§ 37 (1910). Nodaway River, Missouri

§ 38 (1916). Oklawaha River, Florida; Kyle and Young Canal and "Morrison Landing Extension: substituted.

§ 39 (1917). Ollala Slough, Oregon

§ 40 (1910). One Hundred and Two River, Missouri

§ 41 (1904). Osage River, Missouri

§ 42 (1921). Platte River, Missouri

§ 43 (1917). Saint Marys River, Ohio and Indiana

§ 44 (1907). Sturgeon Bay, Illinois

§ 45 (1915). Swan Creek, Toledo, Ohio

§ 46 (1922). Tchula Lake, Mississippi

§ 47 (1926). Eagle Lake, Louisiana-Mississippi

§ 48 (1934). Noubee River, Mississippi

§ 49 (1936). Bayou Saint John in New Orleans

§ 50 (1937). Turtle Bay and Turtle Bayou, Texas

§ 51 (1937). Scajaquada Creek, New York

§ 52 (1937). Park River, Connecticut

§ 53 (1937). Benton Harbor Canal, Michigan

§ 53a (1963). Additional portion of Benton Harbor Canal, abandoned as navigable.

§ 54 (1937). Burr Creek, Bridgeport, Connecticut

§ 55 (1937). Bayou Savage (or Chantilly) In New Orleans

§ 56 (1955). Fort Point Channel and South Bay, Boston, Massachusetts

§ 57 (1955). Pike Creek, Wisconsin

§ 58 (1955). Acushnet River section of New Bedford and Fairhaven Harbor, Massachusetts

§ 59 (1955). West River in West Haven, Connecticut

§ 59a (1957). Back Cove, Portland, Maine

§ 59b (1959). Bayous Terrebonne and LeCarpe, Louisiana

§ 59c (1965). East River, New York

§ 59c-1 (1968). East and Hudson Rivers, New York

§ 59c-2 (1974). East River, New York

§ 59d (1964). River Basin, Michigan

§ 59e (1967). Bayou Lafourche, Louisiana

§ 59f (1968). Boston Inner Harbor and Fort Point Channel, Massachusetts

§ 59g (1968). Steele and Washington Bayous, and Lake Washington, Mississippi

§ 59h (1968). Northern Embarcadero area, San Francisco, California

§ 59i (1968). Patapsco River, Maryland

§ 59j (1972). Delaware River, Philadelphia County, Pennsylvania; permanent structures

§ 59k (1974). Wicomico River, Maryland

§ 59*l* (1976). The prohibitions and provisions for review and approval concerning wharves and piers in waters of the United States as set forth in sections 403 and 565 of this title shall not apply to any body of water located entirely within one State which is, or could be, considered to be a navigable body of water of the United States solely on the basis of historical use in interstate commerce.

§ 59m (1976). Lake Oswego, Oregon; Lake Coeur d'Alene, Idaho; and Lake George, New York

§ 59n (1976). Hudson River, Hudson County, New Jersey

§ 59o (1976). Hackensack River, Hudson County, New Jersey

§ 59p (1947). Kenduskeag Stream, Penobscot County, Maine

§ 59q (1980). Erie Basin, Buffalo Harbor, New York

§ 59r (1980). Trent River, Craven County, North Carolina

§ 59s (1981). Green River, Washington

§ 59t (1983). Burnham Canal, Milwaukee, Wisconsin.

CALIFORNIA HARBORS & NAVIGATION CODE

Division 1.5

NAVIGABLE WATERS

Chapter 1. Scope of Division

§ 90. Application to navigable waters

> "The provisions of this Division, in so far as they are not in conflict with the admiralty and maritime jurisdiction and laws of the United States, apply to navigable waters of the United States." (Stats.1937, c. 368, p. 794, § 90.)

Chapter 2. Definition and Description

§ 100 Navigable Waters Defined.

> "Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purpose of navigation and of such transportation. However, the floodwaters of any navigable river, stream, slough, or other watercourse while temporarily flowing above the normal high-water mark over public or private lands outside any established banks of such river, stream, slough, or other watercourse are not navigable waters and nothing in this section shall be construed as permitting trespass on any such lands. For the purposes of this section, "floodwaters" refers to that elevation of water which occurs at extraordinary times of flood

and does not mean the water elevation of ordinary annual or recurring high waters resulting form normal runoff." (Stats. 1937, c. 368, p. 794, § 100. Amended by Stats. 1972, c. 1072, p. 2008, § 1.) [Note: 1972 added second and third sentence.]

§ 101 Enumeration of navigable waters and public ways

"The following streams and waters are declared navigable and are public ways:

"Albion River, to a point three miles from its mouth.

"Alviso Slough, sometimes called Steamboat Slough, lying between the bay of San Francisco and the place where it was crossed by the tracks of the Southern Pacific Railroad Company on June 10, 1913.

"Big River, to a point three miles from its mouth.

"Channel Street, in the city of San Francisco, from the bay to the northeasterly line of Seventh Street, the width thereof to be one hundred forty feet.

"Clear Lake in Lake County; but this declaration shall not interfere with any rights of owners and claimants to reclaim swamp or overflowed land around the margin of Clear Lake.

"Corte Madera Creek, in Marin County, from its mouth to a point as far as tidewater flows.

"Coyote River between the bay of San Francisco and the place where it was crossed by the tracks of the Southern Pa-

cific Railroad Company on June 10, 1913." (Stats.1937, c. 368, p. 794, § 101.)

§ 102 Enumeration of navigable waters and public ways

"The following streams and waters are also navigable and are public ways:

"Deer Creek, between its mouth and the house of Peter Lassen.

"Devil's Slough, lying within the corporate limits of the city of San Jose, or of the town of Sunnyvale in Santa Clara County, and extending to San Francisco Bay.

"Diablo Creek, from its junction with the Neuces, to a point opposite the warehouse of Frank Such, in Contra Costa.

"Feather River, between its mouth and a point fifty feet below the first bridge crossing Feather River above the mouth of the Yuba River.

"Galinas, or Guyanas Slough or creek, in Marin County, from its mouth to the line of the Sonoma and Marin Railroad as it existed on March 18, 1907.

"Guadalupe Slough, which is the outlet or mouth of the Guadalupe River, and lies between San Francisco Bay and its junction with Alviso Slough." (Stats.1937, c.368, p. 794, § 102.)

§ 103 Enumeration of navigable waters and public ways

"The following streams and waters are also navigable and are public ways:

"Johnson's Creek, from its mouth at San Francisco Bay to Simpson's Landing.

"Keys Creek, also known as the Arroyo de San Antonio, in Marin County, from its mouth at Tomales Bay to the warehouses on the point at Keys embarcadero.

"Klamath River, from its mouth in Del Norte County to its confluence with the Shasta River in the county of Siskiyou; but this shall not abrogate or infringe upon mining rights or the rights of locating or operating mining claims on the Klamath River, existing on August 21, 1933, otherwise than by being made subject to the public rights of way herein declared.

"Arroyo del Medo, in the county of Santa Clara, from its mouth to the upper line of the town of New Haven.

"Mission Creek, in the county of San Francisco.

"Mokelumne River, between its mouth and the first falls.

"Moro Cojo Slough, in Monterey County, from Salinas River to tidewater." (Stats.1937, c. 368, p. 795, § 103.)

§ 104 Enumeration of navigable waters and public ways

"The following streams and waters are also navigable and are public ways:

"Napa River, between its mouth and a point sixty feet below the westerly line of Lawrence Street in the city of Napa; First Napa Creek, Second Napa Creek, and Third Napa Creek, in Sonoma County, between Napa and Sonoma rivers.

"Neuces creek, from its mouth at Suisun Bay to a point one-half mile above the warehouse of George P. Loucks

"Newport Bay, in the county of Orange, and all its arms, and the sloughs connecting with the bay in which the tide ebbs and flows, including "The Rialto" and "The Rivo Alto" as shown upon a map of Canal Section, Newport Beach, recorded in Book 4, page 98 of Miscellaneous Maps, records of Orange County, California.

"Novato Creek or estuary, in Marin County, from its mouth to Sweetzer's Landing.

"Noyo River, to a point three miles from its mouth.

"Petaluma River, from its mouth to the southerly line of Washington Street, in the city of Petaluma." (Stats.1937, c. 368, p. 795, § 104. Amended by Stats.1939, c. 613, p. 2034, § 1.) (Note: The amendment related to the description of Newport Bay.)

§ 105 Enumeration of navigable waters and public ways

"The following streams and waters are also navigable and are public ways:

"Sacramento River, between its mouth and a point 100 feet below Reid's Ferry, in Shasta County.

"Salinas River, and Elkhorn Slough, or Estero Viejo, in Monterey County, from its mouth to a point as far up as tidewater flows.

"San Joaquin River, between its mouth and Sycamore Point.

"San Leandro Bay, in the County of Alameda, the waters included in the estuary of San Anto-

nio and the tidal canal connecting it with San Leandro; and the airport channel extending from the bay.

"San Rafael Creek, in Marin County, from its mouth to a point as far as tidewater flows therein.

"Sonoma River, between its mouth and a point opposite Fowler's Hotel in the town of San Luis.

"Stockton Slough, between its mouth and a line 160 feet west of the east line of Center Street extended in Stockton.

"Suisun River, between its mouth and the Town of Suisun embarcadero.

"Tuolumne River, between its mouth and Dickinson's Ferry.

"**Yuba River**, [2] between its mouth and a point at the mouth of the slough at the foot of F Street, in the City of Marysville. (Stats.1937, c. 368, p. 796, § 105; Amended by Stats.1937, c. 911, p. 2515; Stats.1952, 1st Ex.Sess., c. 2, p.

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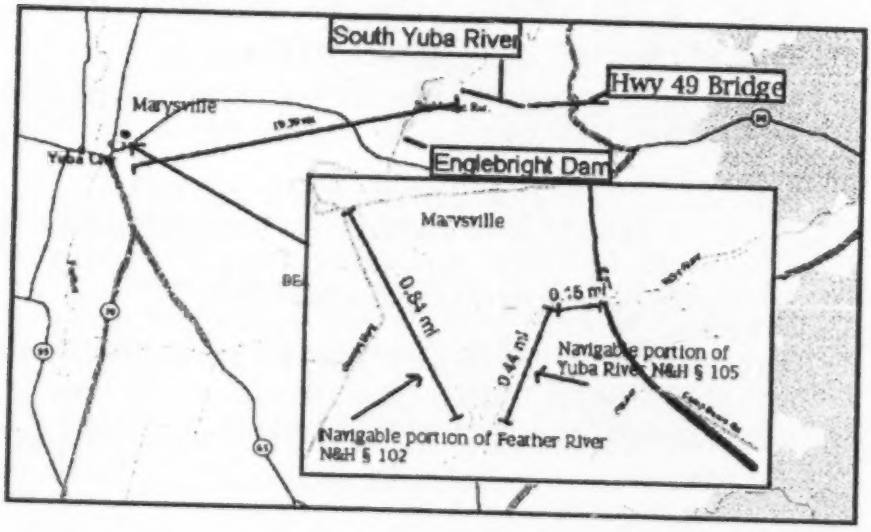
[2] Map of area:



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306, § 1.) [Note: 1952 Amendment related to Stockton River.]

§ 106 Enumeration of navigable waters and public ways

"The following streams and waters are declared navigable and are public ways:

"The north branch of Alameda Creek, from its mouth to Eden Landing.

"The streams and sloughs emptying into Eel River.

"The streams and sloughs south of Humboldt Point, in Humboldt County, which at high water mark have a depth of two feet of water, and which are wide enough to float and admit a boat carrying five tons or more of weight.

"That part of a slough which lies between Simonds Canal in the town of Alviso and the bay of San Francisco.

"That certain creek running through the tideland survey numbered 68, and swamp and overflowed land survey numbered 145, from its mouth to the head of the tidewater therein." (Stats.1937, c. 368, p. 796, § 106.)

California Penal C., § 834:

"An arrest is taking a person into custody, in a case and in the manner authorized by law. An Arrest may be made by a peace officer or by a private person. (Emphasis added.)"

California Penal C., § 837:

"A private person may arrest another: 1. For a public offense committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact com-

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mitted, and he has reasonable cause for believing the person arrested to have committed it."

California Penal C., § 647:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: ***** (g) Who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant thereof. As used in this subdivision, "loiter" means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered."

California Penal C., § 602(n):

"Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, and being informed by the peace officer that he or she is acting at the request of the owner, the owner's agent, or the person in lawful possession, or (2) the owner, the owner's agent, or the person in lawful possession. The owner, the owner's agent, or the person in lawful possession shall make a separate request to the peace officer on each occasion when the peace officer's assistance in dealing with a trespass is requested. However, a single request for a Peace Officer's assistance may be made to cover a limited period of time not to exceed 30 days and identified by dates, during which there is a fire hazard or the owner, the owner's agent, or person in lawful possession is absent from the premises or property. In addition, a single request for a peace officer's assistance may be made for a period not to exceed six

months when the premises or property is closed to the public and posted as being closed. However, this subdivision shall not be applicable to persons engaged in lawful labor union activities which are permitted to be carried out on the property by the California Agricultural Labor Relations Act, Part 3.5 (commencing with Section Labor C., § 1140;) of Division 2 of the Labor Code, or by the National Labor Relations Act. For purposes of this section, land, real property, or structures owned or operated by any housing authority for tenants as defined under Section 34213.5 of the Health and Safety Code constitutes property not open to the general public; however, this subdivision shall not apply to persons on the premises who are engaging in activities protected by the California or United States Constitution, or to persons who are on the premises at the request of a resident or management and who are not loitering or otherwise suspected of violating or actually violating any law or ordinance. (Emphasis added.)"